



PACIFIC LEGAL FOUNDATION

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San Jose State University
Provost Vincent J. Del Casino
Dean Walt Jacobs
Chair Roberto Gonzalez

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Re: Professor Elizabeth Weiss

Dear Provost Del Casino, Dean Jacobs, and Chair Gonzalez:

We are attorneys with Pacific Legal Foundation, a public interest law firm that fights for individual liberty, economic opportunity, and freedom of speech for all Americans.

We are writing this letter on behalf of Professor Elizabeth Weiss regarding unconstitutional threats of retaliation from officials at San Jose State University (SJSU) against Professor Weiss because of her academic research and writing, and her desire to introduce her students to a different perspective regarding the repatriation of Native American remains.

Professor Weiss has faced serious backlash and threats of adverse action by university administrators for expressing her viewpoint on a matter of academic importance in her field. She has been tarred as a racist professor by university officials even though throughout her long career she has never exhibited even a trace of racism. And she has been told that if she dares to teach her views to her students, she could face disciplinary action or other forms of retaliation.

At the start of a new semester, we write to warn the University that any action taken against Professor Weiss for her speech would violate not only norms of academic freedom, but also the First Amendment to the United States Constitution. Universities must be a place where different perspectives are encouraged and nurtured rather than suppressed. As the United States Supreme Court has explained: “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957).

Unfair Treatment and Threats Against Professor Weiss:

Professor Weiss is a full, tenured professor of anthropology at San Jose State University in California. She specializes in osteology—the study of human skeletal remains. As part of her work, she has published and spoken about the Native

American Graves Protection and Repatriation Act (NAGPRA) and similar laws, which require laboratories and museums to hand over certain Native American remains and artifacts to the exclusive control of tribal descendants. Professor Weiss's scholarship has criticized these laws as stunting scientific research and argued that such laws may violate the Establishment Clause and Equal Protection Clause.

Professor Weiss has written about these topics for years and before last year had never received criticism or pushback within the university. To the contrary, she has been repeatedly recognized by the University for her superb research and writing. For instance, in 2019 Professor Weiss received the Austin D. Warburton Award of Merit from the College of Social Sciences. And just a few years ago she was commended by Roberto Gonzalez, the chair of the SJSU Anthropology Department for her ability to “spark lively discussions among various stakeholders” and to “boost the department’s national reputation as a center that fosters creative and unorthodox viewpoints on important issues.”

In late 2020, Professor Weiss published *Repatriation and Erasing the Past* with coauthor James W. Springer. The publication of Professor Weiss's book sparked much discussion but also a significant backlash as about a thousand professors and graduate students, including some of Weiss's colleagues signed an open letter condemning the book as “anti-indigenous” and “racist” for arguing that indigenous communities should not be given exclusive or preferential control over remains of general scientific interest. No similar claims of racism had been leveled by peer reviewers or the publisher, and Professor Weiss is not alone in her field with her views on repatriation of remains.

Prompted by the open letter, Chair Gonzalez put together an “anti-racism” speaker series for the department in response to the book. Speakers at the event expressed views that Professor Weiss saw as counter to academic freedom and open debate, specifically arguing that views like hers should be shut down. Professor Weiss asked for the chance to convene a speaker series responding to the anti-racism speakers but was denied access to funding or administrative help in putting together the event.

In early June, Walt Jacobs, the Dean of the College of Social Sciences hosted a zoom event for deans and chairs entitled “What to Do When a Tenured Professor is Branded a Racist.” Throughout the hour-long event, the university administrators

present repeatedly branded Weiss a white supremacist, and one even compared her views on repatriation to lynching.¹

Chair Gonzalez spoke for most of the event and expressed open agreement with all those who castigated Weiss during the event. He called Weiss's views on repatriation a "retrograde, racist approach to anthropology," accused Weiss of making "classic, racist arguments in her work," and called her his "racist colleague." He openly expressed regret that she was tenured and implied that he'd take adverse action against her if she weren't. Indeed, he suggested that she was "professionally incompetent," which would be the predicate for taking action to revoke her tenure. Gonzalez candidly agreed with a colleague in the event that allowing Weiss to teach about repatriation to students was unethical. He indicated that he would try to take action to penalize or prevent Weiss from teaching her viewpoint in the classroom. He then stated that while he couldn't do anything about her employment status until her tenure review came up several years down the road, he would take a "very different approach" if she tried to teach the subject in class.

Professor Weiss has long taught about repatriation in her classes and plans to do so this upcoming semester. Her syllabus, which includes repatriation as a topic, has been already submitted. Professor Weiss plans to expose students to the topics raised in her book as well as to contrary viewpoints. She wants to encourage her students to think about and debate the tradeoffs when we take historically and scientifically significant objects out of the realm of study. Professor Weiss will begin to teach this material in her classes towards the second half of September.

Professor Weiss remains concerned that Chair Gonzalez or Dean Jacobs will take adverse action to chill her expression in the classroom on this topic, which could take a number of forms. Professor Weiss is concerned, for instance, that the department will bar her from financial and administrative resources, indicated by Gonzalez's refusal to give her access to resources to put together a speaker series in response to the "anti-racism" event. The department could attempt take her out of the classroom or compel her to change her course materials or topics. And the department could forbid her access to the curated skeletal remains located at the university, which are essential to her work.

¹ The event leaders used the pseudonym of "Professor Jones" when referring to her, but the speakers referred openly to Prof. Weiss's book and the controversy it engendered, which had received wide public attention. There can be no reasonable doubt that the event was targeted at Prof. Weiss.

In an attempt to resolve these concerns, Professor Weiss reached out to Chair Gonzalez asking for assurances that the university would not prevent her from teaching these issues or retaliate against her for doing so. He responded by pointing out that university policy preserved academic freedom for both faculty and student that he would “continue upholding it as long as I’m affiliated with the University.”

Professor Weiss responded by explaining that that while she appreciated his reference to academic freedom, she remained concerned about the specific remarks he made during his presentation. She asked specifically what might be the “damaging consequences” that he referred to during the event that she would face if she taught about her book. She asked Gonzalez to “retract these statements pointing at retaliation and confirm that no adverse actions will be taken if I teach from my book or express my viewpoint on repatriation in the classroom.”

He responded by claiming that he was not in a “structural position to ‘retaliate’ against faculty.” Professor Weiss believes that this is false, as Chair Gonzalez is responsible for administering the budget of the Anthropology Department and for class schedules and assignments. Chair Gonzalez recommended that if she was concerned that she was being treated unfairly she should either inform the dean or file a grievance with the California Faculty Association. He also mentioned in a postscript that he had not consented to have his talk recorded and that doing so might have violated California’s privacy laws. Professor Weiss interpreted this last statement as a threat. In light of Chair Gonzalez’s dismissive posture and refusal to confirm that no adverse action would be taken, Professor Weiss remains concerned that Chair Gonzalez will retaliate against her.

After Professor Weiss’s conversation with Chair Gonzalez, Dean Jacobs reached out to her about the zoom event. While initially conciliatory, he has given Professor Weiss no assurance that no adverse action will be taken.

After their discussion, Professor Weiss drafted an email laying out what she was looking for in a letter from the University. She specifically asked for assurances that her ability to assign her book and to speak about her research in the class would not be restricted as well as her ability to access skeletal remains for research purposes.

The University refused. In early August Dean Jacobs informed Professor Weiss that the Provost and Office of Faculty Affairs would not let him provide her a letter. The University had determined that if she feels her academic freedom has been violated, she should go through the university grievance process. However, Professor Weiss

is concerned that this process would not adequately safeguard her rights since she is not a member of the California Faculty Association. Dean Jacobs also indicated that there is pressure (although he didn't say from whom) for him to silence Professor Weiss or try to get rid of her.

In light of this pressure from unknown sources and the threatening remarks from Chair Gonzalez, which have never been retracted, Professor Weiss remains deeply concerned that the University will take action against her if she speaks out about her views or teaches them to her students.

Any Retaliation Against Professor Weiss Would be Unconstitutional

The Supreme Court has long held that freedom of expression “is nowhere more vital than in the community of American schools,” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), and that the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.” *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967). These First Amendment protections have ensured that American universities have been places where once controversial viewpoints such as support for the civil rights movement or the fight for LGBTQ rights could be developed and nurtured. Several courts have confirmed that the First Amendment limits university efforts to impose orthodoxy on classroom discussion, on research and publications, and on extramural speech by a professor. *See, e.g., Levin v. Harleston*, 966 F.2d 85, 88 (2d Cir. 1992) (involving a university retaliating against a professor’s speech outside the classroom by undercutting his teaching). The 9th Circuit in particular has reiterated that the First Amendment protects a professors’ teaching and academic writing. *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).

A professor’s speech on matters of “public concern” is accorded First Amendment protection unless the speech would “impede[] the teacher’s proper performance of his daily duties in the classroom” or “interfere[] with the regular operation of the schools generally.” *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563, 572 (1968). Professor Weiss’s speech is unquestionably about a matter of public concern within her profession. Publishing a book and assigning her students to read from her book does little to “impede[] the teacher’s proper performance of [her] daily duties in the classroom” or “interfere[] with the regular operation of the schools generally.” To the contrary, the discussion and debate of potentially controversial viewpoints is the essence of the university experience and merits rigorous First Amendment protection.

The Sixth Circuit's recent decision in *Meriweather v. Hartop* shows that Courts continue to vigorously protect the First Amendment rights of professors even in extremely controversial matters. In *Meriweather*, the Sixth Circuit found in favor of a Professor who had refused to use a student's preferred pronouns. The University had ordered the professor to use the student's preferred pronouns and had prohibited the professor from even communicating his view on the topic of preferred pronouns on the courtesy syllabus. 992 F.3d 492 (6th Cir. 2021). The court condemned the university for "silenc[ing] a viewpoint that could have catalyzed a robust and insightful in-class discussion," and explained that "[w]ithout sufficient justification, the state cannot wield its authority to categorically silence dissenting viewpoints." *Id.* at 506-07.

The court emphasized that there were "three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints." *Id.* The professor had the right to express his position even though it was unpopular, and indeed this was "all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Id.* at 510 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000)). Moreover, students had an interest "in hearing even contrarian views." *Id.*

On the other hand, the Court found that even "[p]urportedly neutral non-discrimination policies" could not be used to bar speech and turn universities into "enclaves of totalitarianism." *Id.* Since the speech in question could "neither [be] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally," the university lacked a sufficient justification for restricting the speech. *Id.* at 511.

This precedent suggests that if action were to be taken against Professor Weiss, it would almost certainly be enjoined by a court. If the speech in *Meriweather* was protected, then there can be no doubt that Professor Weiss's speech would similarly be protected, especially in light of the Ninth Circuit's strong protection for professorial speech. *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014). The speech in *Meriweather* was tangential to the classroom discussion and the student who was misgendered felt disrespected and discriminated against by the professor. In contrast, Professor Weiss's scholarly publications and speech are directly germane to the subject of the classes she teaches. She encourages her students to engage with, debate, and discuss her work and the arguments to the contrary. And there is

San Jose State University
August 19, 2021
Page 7

not even a shred of evidence that Weiss's views are harassing or discriminatory. Accordingly, any attempt to "mandate[] orthodoxy" and silence Professor Weiss would not be justifiable.

The Pacific Legal Foundation will be watching closely to ensure that Professor Weiss's rights are protected. If the University takes any further action against her, then we will not hesitate to take further steps to vindicate her rights.

Sincerely,



DANIEL ORTNER
Attorney



ETHAN BLEVINS
Attorney